IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 376

DUNBAR-STANLEY STUDIOS, INC.
a Corporation,
Appellant,

versus

STATE OF ALABAMA,
Appellee.

BRIEF ON BEHALF OF APPELLEE.

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I.

OPINIONS BELOW.

The Appellant's brief in this cause is replete with what the Appellee considers to be inaccuracies and contains several irrelevant and impertinent statements. Despite the foregoing, however, we can agree with the Appellant that the opinion below is unofficially reported in 210 So.(2d) 696, and a copy of such is found in the Appendix at page 37. The decree of the trial court is found in the Appendix at page 35.

The opinion of the Supreme Court of Alabama in this case, is predicated on two former decisions of the Alabama court which involved facts which are similar, and wherein the issues involved are practically the same. See **Graves v. State**, 258

Ala. 539, 62 So.(2d) 446 (1953), and **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So.(2d) 388 (1961).

In the **Graves** case, Graves was a traveling photographer for Olan Mills, Inc. And while the transient photographers in **Graves** and **Haden** were represented by able and distinguished counsel they chose not to appeal the decision of the Alabama court to this Honorable Court. See also **Olan Mills, Inc. of Tennessee v. City of Opelika, et al**, 207 F.Supp. 332, 335 (1962), wherein the United States District Court M.D. Alabama, E.D., gave its approval to the doctrines of both **Graves** and **Haden**. The District Court also relied upon the case of **United Gas Pipeline Company v. Ideal Cement Company**, 369 U.S. 134, 82 S.Ct. 676, in holding that it was the duty and prerogative of the courts of the state to define the characteristics and the authoritative meaning of state license and tax statutes. This the Alabama Court has done as to that part of Title 51, Section 569, Code of Alabama 1940, which levies a license tax on a "transient or traveling photographer," over a span of some fifteen years.

The determination made in this respect by the Supreme Court of Alabama in **Haden v. Olan Mills, Inc.**, supra, 135 So.(2d) at page 390, which is also typical of the conclusions reached in said other cases, in defining the characteristics and authoritative meaning of Title 51, Section 569, Code of Alabama 1940, to the extent of that statute levying the license tax on a "transient or traveling photographer," is as follows:

> "As we have shown above, we feel that the conduct of the photographer in this state is a separate and distinct incidence upon which the tax falls."

The Alabama court then has repeatedly defined the statute insofar as it relates to a "transient or traveling photographer," to be a license tax on the individual transient photographer, and for the privilege of such photographer carrying on his profession in a county or counties in this state where he has no fixed

place of business and to be so directed on the activities of such individual photographer in this state, consisting mainly in his conducting the sittings and in his taking the pictures or exposures with his camera. **Graves** (1953), supra, 62 So.(2d) at page 389; **Haden** (1961), supra, 135 So.(2d) at page 390, **Olan Mills, Inc., of Tennessee** (1962), supra, 207 F.Supp. at page 335.

II

JURISDICTION

We disagree with the statement made by the Appellant in the first paragraph of its statement as to "jurisdiction," and which is found on page one of its brief, to the effect that the State of Alabama imposed a flat privilege license on Appellant "as a transient or traveling photographer," for its activities in Alabama. The thing which has been imposed by the Legislature here is not a license in the strict sense of the word. It is simply a tax. The tax in this respect is in effect not a lump sum tax. It is actually a graduated tax of five dollars a week for each week that an individual transient or traveling photographer carries on his profession in a specific county in Alabama, where he does not have a fixed or regular place of business. And it matters not whether such photographer comes from another county in Alabama or from without the state, or has a fixed location in another county or counties in this state, he is required to pay said state tax of five dollars a week in each county in this state in which he carries on his profession and in which he has no fixed or regular place of business. **Graves v. State**, 258 Ala. 359, 62 So.(2d) 446, at pages 448 and 449.

Such tax as is shown by the final assessments which were made by the State of Alabama against the Appellant in this case, and which formed the basis for the appeals in the courts below, were not made because of the Appellant's alleged

solicitations, sales or overall activities, but were made against the activities of Appellant's traveling photographers in this state, and which were confined in this connection to said photographers conducting the sittings and taking the pictures or exposures of the customers with their cameras. Actually that was the extent of said transient or traveling photographer's duties or activities in Alabama from what the evidence in this case discloses. It is true that the transient photographers were the agents and employees of the Appellant, but it was the activities of such photographers in Alabama at which the license tax on transient photographers was directed, and the photographers were the persons whom the tax hit. An examination of the assessments made by the state in this respect will disclose that these assessments were based on the activities of each transient or traveling photographer in Alabama, and in each county in this state where such photographers operated, and where neither they nor the company maintained a fixed or regular place of business. Thus, the Appellee contends, and the Alabama Courts have so held as has been pointed out under "Opinions Below," that under the circumstances, said transient photographer's license tax was not directed at interstate commerce, but at the conduct and activities of such photographers, which took place within the State of Alabama.

With the exception of the foregoing and wherein the Appellee has denied the correctness of what the Appellant has said in the first paragraph under this topic, Appellee has no quarrel with what the Appellant states under the second and third paragraphs under "Jurisdiction," as appearing on page two of Appellant's brief.

III

STATUTE INVOLVED

The license tax statute wherein the license tax levied by the Alabama Legislature on a "transient or traveling photographer"

is included as a separate and distinct levy and tax is found in the last sentence of Title 51, Section 569, Code of Alabama 1940, Recompiled 1958. The statute was amended in 1967, but we are not concerned with the amended Act in this case. Title 51, Section 569, supra, has been quoted in its entirety under "Statute Involved," page 2 of the Appellant's brief, so we will not reiterate here.

The pertinent part of Section 569, supra, which levies the separate and distinct license tax on transient photographers, with which we are concerned, is as follows:

> "For each transient or traveling photographer, five dollars a week."

The separate license tax on photographers with fixed locations within the county or photograph galleries is contained in the first part of Section 569, supra, and is a different tax from that levied under the same Code Section on a "transient or traveling photographer."

The law is well established that both the Congress and the State Legislatures have the right to set up classes, and even subclasses, for the purpose of taxation, and where the tax is applied equally to all within the class or the subclass, and there is any possible reason or basis for distinction or for setting up a particular class or subclass, that such statutes are to be sustained under the Due Process of Law and Equal Protection of the Laws Clauses of the Constitution. **Carmichael v. Southern Coke and Coal Company** (1937) 301 U.S. 583, 57 S.Ct. 868; **Clark v. Paul E. Gray, Inc.** (1939), 306 U.S. 583, 59 S.Ct. 744; **Federal Power Commission v. Tuscarora Indian Nation** (1960), 362 U.S. 99, 80 S.Ct. 543. This would appear to be just as applicable under the Commerce Clause of the Constitution. **Caskey Baking Company v. Commonwealth of Virginia** (1941), 313 U.S. 117, 61 S.Ct. 881. **Wagner v. City of Covington** (1919), 251 U.S. 95, 40 S.Ct. 93; **Armour & Co. v. Commonwealth of Virginia** (1918), 246 U.S. 1, 38 S.Ct. 267.

There is certainly a clear distinction between a photograph gallery and one who follows the profession of a transient or traveling photographer, going from county to county in this state, and following his profession therein, and in which counties they have no fixed place of business. It makes no difference whether a photographer has a fixed place of business in Montgomery County or any other county in Alabama, if he sends photographers out to other counties in this state to conduct sittings and take pictures or exposures as a part of such business, then such photographers are subject to said license tax in each county in which they so operate, and where said photographer has no fixed place of business. The same would also be true as to photographers, who so operate, and who come from Chattanooga, Tennessee, or points in North Carolina, or in other states. For the purpose of this license tax the State of Alabama has treated all of them equally, and there is certainly no evidence in this case to the contrary, although the burden of proof was on the Appellant in the lower courts. There also appears to be a good reason to put "transient or traveling photographers" in a separate class for the purpose of taxing them. In addition, there is absolutely no evidence in this case that there has been any discrimination within the class or the subclass, if it is to be called that, or that all transient or traveling photographers have not been treated equally in the levy and application of this tax by the State of Alabama, whether coming from within or without this state. Graves v. State, 258 Ala. 359, 62 So.(2d) 446, and discussion under footnotes 2 and 3 at pages 448 and 449.

Title 51, Section 569, supra, being one of the business, occupational and professional privilege or license taxes, is also subject to the general provisions applicable to all such privilege or license taxes which are contained in Title 51, Chapter 20, Articles 1 and 13, Code of Alabama 1940, Recompiled 1958. The Appellant has quoted some few of these general provisions under this topic in his brief.

IV

QUESTIONS PRESENTED

The questions as represented by the Appellant under this topic in its brief are for the most part purely hypothetical and are not in keeping with the actual facts involved. The evidence in this case shows that the solicitations were made by the employees of the local J. C. Penney stores, and there were no orders taken or solicitations made in this state by the Appellant or by Appellant's photographers. (Appendix, pages 4 and 5, 18, et seq.)

> "We do not find anywhere in the record that the photographer took orders for the pictures. This was done, as we have stated, by Penney employees and mailed to Appellant for acceptance." (Appendix, page 39)

The Appellant's statement to the contrary under this topic and on page 5 of its brief, insofar as it relates to the Appellant's activities in this state, then is incorrect, and is contrary to the facts and the record.

The Appellant under this topic, and also persistently throughout its brief, seeks to show a similarity or relationship between this case and that of Dunbar-Stanley Studios, Inc. v. City of Mobile (No. 377). This is obviously done by the Appellant to confuse the real issues in this case and to prejudice the minds of the court into thinking that there was some kind of evil conspiracy between the city and the state to put the Appellant out of business. The attempt made by the state to collect the tax from the Appellant as to the activities of its photographers in this state in operating in some nineteen counties in this state, related only to what it was required to do under the State License Tax Statute, and what it had done, and was required to do, in the case of all other "transient or traveling" photographers operating in this state, whether they come from within or without the state. We know of no reason after the activities of the Appellant's photographers were

detected, why the state should have treated the Appellant's "transient or traveling" photographers any differently from all the others (whether coming from within or without the state) in this respect.

The Mobile City Ordinance, as can be seen by a reference to the briefs and the record in Case No. 377, is entirely different from the license tax levied by the state under Title 51, Section 569, supra, on "transient or traveling" photographers. The one has absolutely nothing whatsoever to do with the other, and there is no connection whatsoever between the two. The Alabama Court recognizing this to be the case, refused to allow the cases to be consolidated even for the purpose of oral argument, when the cases were submitted (entirely separately) in that court.

The Appellant's remarks in this connection then are completely dehors the record and are purely prejudicial.

The alleged questions stated by the Appellant to be the questions involved under this topic of its brief appear to be purely hypothetical and not to be related to the real facts in the case. They are, therefore, unacceptable insofar as the Appellee is concerned.

From the facts spring the questions, particularly in this kind of a case. The facts being set out in the Appendix, we are actually hesitant on our part to state what the questions appear to be in the light of this court's long years of experience in treating with the various problems which have arisen under the Commerce Clause. Moreover, this court has repeatedly held in decisions too numerous to recount that such cases are to be decided on their own specific facts.

The court below (Appendix, page 39) stated the questions to be:

> "The contention of appellant is that it was operating through the channels of interstate commerce, and was exempt under Article 1, Section 8, Constitution of the

United States, which empowers Congress to regulate commerce among the several states. Appellant insists that the taking of the pictures, or exposing the films, was just a link in a chain of events that constituted an interstate transaction, and that it took all the activities enumerated above to constitute engaging in business as a photographer; hence, the license had to apply to all of it, or there would be no activity to which the license would apply. It insists that this activity, consisting of soliciting orders for out of state activity ending in delivery into the State, is a continuous stream or flow of events which meets the definition of interstate commerce.

"Appellee insists that no exemption obtained, and that appellant in exposing the films and taking the pictures of the children was engaged in a taxable event under Section 569, supra, and was subject to the flat tax imposed by said section."

It is the contention of the Appellee that the license tax under Title 51, Section 569, supra, is directed at the "transient or traveling" photographer and his following his profession in this state, and his activities in this state, which can be reasonably and realistically separated from the activities which may take place in interstate commerce.

The court below appears to have so decided the question on three different occasions, including the decision in this case. See also **Graves v. State** (1952), 258 Ala. 359, 62 So.(2d) 446, and **Haden v. Olan Mills, Inc.** (1961), 273 Ala. 129, 135 So.(2d) 388.

This will be apparent when the following excerpts from those decisions are considered:

"The distinction between such a situation and that of drummers solociting and procuring sales to be consumated by interstate shipments has been narrowly drawn in express terms, as we have shown . . .

"The license here is not laid on the solicitation of the orders."

(Emphasis Supplied)

Graves v. State, 258 Ala. 359, 62 So.(2d) 446, at page 447 (1952).

"The opinion in the Graves case shows that liability for the license was not based on any act of the solicitors used by Olan Mills, Inc., in obtaining the customers, but was based on the conduct of its photographer who moved about in this state from place to place pursuing his profession . . ."

(Emphasis Supplied)

Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 338, at page 389 (1961).

"As we have shown above, we feel that the conduct of the photographer in this state is a separate and distinct incidence upon which the license tax falls."

Haden v. Olan Mills, Inc., supra, 135 So.(2d) at page 390.

Moreover, this court has held that the authoritative meaning of a state statute is a matter alone for the state courts to decide:

"Who in a particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority."

Alabama v. King & Boozer, 314 U.S. 1, at pages 9 and 10, 62 S.Ct. 43, at page 46.

"The interpretation of state law by the Court of Appeals, in an opinion by its Alabama member, was rendered in advance of construction of the License Code by the courts of the state, which alone, of course, can define its authoritative meaning."

(Emphasis Supplied)

United Gas Pipe Line Company v. Ideal Cement Company, 369 U.S. 134, at page 135, 82 S.Ct. 676, at page 677.

See also **Olan Mills, Inc. of Tennessee v. Opelika, et al**, 207 F.Supp. 332, 334, 335.

V

STATEMENT OF THE CASE

The Appellant in the first paragraph of its Statement of the Case states that it had operated openly at J. C. Penney stores in this state since 1963, without being cited for the license tax by the state. We do not know what this proves. State law in this respect does not require the state to catch those who do not comply with the law, before a particular law or statute is to take effect or become operative. Under the general provisions applicable to the business and professional license taxes, and particularly Title 51, Sections 831 and 834, Code of Alabama 1940, Recompiled 1958, the taxpayer is required to pay the license tax upon the doing of business in this state. These taxing statutes, when read with the particular statute levying the tax, then fix the liability for the tax, and the tax accrues and attaches by operation of law upon the taxpayer engaging in any of such businesses in this state. The fact that the state does not readily detect the taxpayer's activities in this state or fails to catch the taxpayer for a time, does not change the law in this respect, nor does it relieve him from liability. **Griffin, et al v. Edwards**, 260 Ala. 12, 68 So.(2d) 705, at pages 708 and 709.

From the facts the law is made. This appears to be particularly appropriate in cases involving the commerce clause. We will, therefore, give the facts special importance and a substantial amount of space.

The Appellant appears to give little importance to the real facts and makes only brief reference thereto. Even so, the Appellant's Statement of the Case is in part argumentative and contains extraneous matter which is not relevant to the issues, nor can the accuracy of some of its statements be substantiated.

The Appellant's statement that it had no agents in the State of Alabama during the time involved in this case is incorrect. The record shows that during the time involved the Appellant

sent several photographers into Alabama to conduct sittings and to take pictures with their cameras, which activities were conducted locally in Alabama in the space provided for such in some 19 local J. C. Penney Company stores located in some, to wit, 19 different counties in this state.

This is in part disclosed by the record, as follows:

> "Q. In other words, you are primarily involved locally in that your (21) photographers have taken the pictures.
>
> "A. That is correct."
>
> (Appendix, page 33)

In its "Statement of the Case," page 7, the Appellant states that taxpayer's (Appellant's) photographers came into the state and solicited orders for pictures. This is incorrect and untrue and is not supported by the evidence. In fact it is entirely inconsistent with the evidence.

The Appellant in its bill of complaint states the facts to be in this respect, as follows:

> "(2) Advertising for this visit was handled by the J. C. Penney Store, which store also took the orders for pictures, handled all money, and delivered the pictures to to the customers when they were completed.
>
> "(6) The arrangements for the visits by Appellant's photographers and the advertising of the visits are handled and paid for by the local employees of the J. C. Penney stores. The solicitation of the sittings and the location on the premises are made by local employees of the Penney store. The collection of the cost of the pictures and delivery thereof are all handled by the local employees of Penney."
>
> (Emphasis Supplied)
> (Appendix, pages 4 and 5)

The Appellant's activities in Alabama were said by the Appellant in its bill of complaint, to be confined to the following:

"(7) Appellant's activities are limited to taking pictures of persons obtained by Penney, at times and places arranged by Penney * * *"

The employees of the local J. C. Penney Company stores solicited or obtained the customers. (Appendix, pages 4, 5, and 18) There is absolutely no evidence to the effect that Appellant's photographers solicited the orders. Such a statement is misleading and is incorrect.

Mr. Stanley Hoke, President of the Appellant Company best stated the main business of the company as being "a photographic organization making pictures in some forty-eight states." (Appendix, page 15) This is now said to be expanded to fifty states and some foreign countries.

The tax assessment which was the subject of the appeal taken by the Appellant to the Circuit Court in Equity in this cause was made by the State of Alabama against the Appellant in the amount of $225.84, and covered the tax year 1963-1964, and was made as to the activities of the Appellant's individual photographers in conducting sittings and taking pictures in J. C. Penney Company stores located in some 19 counties in this state. The tax was assessed as to each of the individual photographers and as to their activities in this state, and at the rate of five dollars a week as called for by the statute. (Appendix, page 14)

Due to said inaccuracies in the Appellant's Statement of the Case we cannot subscribe to what the Appellant has to say thereunder. Under the circumstances we believe that the facts, in addition to what has already been said, can more fairly and accurately be stated by adopting the findings of fact as made by the Alabama court, viz.:

"Appellant, as we view the pleading and testimony, was a non-resident corporation with its principal place of business in Charlotte, North Carolina, and was so located during the period for which the assessment was made. It

sent a photographer, in its employment, to Alabama, to perform the skilled service of taking children's photographs. The exposed film was sent to the North Carolina studio to be developed and converted into finished photographs, which were sent back to Alabama for delivery to appellant's customers. No photographer engaged in the service was a resident of Alabama.

"It seems that the services relative to certain features of the operation were performed through a contractual arrangement with the parent office of J. C. Penney Company which operates stores in several counties in Alabama. The photographer, under the direction of appellant, visited several of the Penney stores in Alabama during the taxable period here under consideration and performed the photographic service, that is, exposing the films for the purpose of making pictures of the subject children.

"It further appears that the Penney stores caused certain advertising to be done which resulted in the recruitment of customers for the proposed photographic service. Penney also took the orders which were transmitted to appellant in Charlotte for acceptance. When the orders were accepted, the finished product was sent to the Penney store for delivery to the customer and collection of charges therefor. Penney received a percentage of the money so collected and accounted to appellant for the balance. Penney also made accounting reports to appellant and to its home office.

"We might add that appellant prepared cards notifying its customers of the proposed visit of its photographer. These cards were all stamped and mailed by Penney. Penney also did a certain amount of newspaper advertising relative to the photographic service.

"When the photographer arrived at the Penney store, he took the pictures, returned the exposed film to the principal office in North Carolina, where the film was developed, and the picture finished and returned to the Penney store for the delivery to the customer and collection of charges, as above noted. Appellant maintained no office, developing laboratory, or permanent agent in

Alabama. The service of exposing the film on the subject child was performed in Alabama through the photographer, with the equipment temporarily located in Alabama. With the exception of the laboratory work, preparing announcement cards, exposing the films, all the work incident to the photographic service was performed by Penney employees. We do not find anywhere in the record that the photographer took orders for the pictures. This was done as we have stated, by Penney employees and mailed to appellant for acceptance."

(Emphasis Supplied)

Appendix, pages 37, 38 and 39

VI

IN REPLY TO APPELLANT'S SUMMARY OF ARGUMENT AND ALSO ARGUMENT.

Under its "Summary of Argument," brief page 8 et seq., Appellant recites three essentially hypothetical shibboleths, which might fit the circumstances of some cases, but which appear to be very inappropriate and inapplicable under the specific facts of this case.

In fact the Appellant has cited and discussed a number of cases both under "Summary of Argument," page 8 et seq., and "Argument," page 12 et seq. of its brief but none of the cases so cited and discussed fit the facts of this case, nor in any instance are the facts even very similar to the facts of this case. Moreover, and insofar as the decisions of this court are concerned, it is very doubtful that one can be found which would fit the facts of this case, or which would be a controlling precedent.

"The license here is not laid on the solicitation of the orders."

(Emphasis Supplied).

Graves v. State, supra, 62 So.(2d) at page 447.

Moreover, the tax is not directed at sales or selling. These propositions have been repeated by the Alabama court in Olan

Mills, Inc., and in this case. Practically all of the cases cited and relied upon by the Appellant involved "solicitations" and sales purportedly in interstate commerce. Solicitations and sales are not involved here.

It was the late Dr. Jerome Frank who said in his book "Law and the Modern Mind," that law is not an exact science. There is certainly no need to tell this court that if there is one field of law which is more susceptible to Dr. Frank's rather profound statement than any of the others, it is that involving interstate commerce, and particularly that phase of it which is associated with state taxation as applied to persons who do business within a taxing state, but who come from without the state.

1.

ALLEGED FRACTIONALIZING OF INTERSTATE COMMERCE.

The Appellants under this topic speak in general terms of the state fractionalizing interstate commerce for the purpose of taxing an element of it. Actually in this case the tax is clearly and undisputedly levied on the individual "transient or traveling" photographer, and for his carrying on his profession in this state. The conclusive evidence in this respect is that the only activities carried on by the Appellant's photographers in this state was conducting the sittings and taking the pictures. This was also true in the case of the photographers in Graves v. State, 258 Ala. 359, 62 So.(2d) 446 (1953), and Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388 (1961).

The activities at which said license tax is said to be directed is said to be the purely local activities of the photographer in carrying on his profession in Alabama. This has been very appropriately noted by the United States District Court for the Middle District of Alabama in its opinion in Olan Mills, Inc. v. Opelika, et al, 207 F.Supp. 332 (1962), at page 335, as follows:

"The significance of the action by the Supreme Court of Alabama in the **Graves and Olan Mills, Inc.** cases to this particular case now before this Court arises out of the holdings of the Supreme Court of the United States in March of this year when it decided **United Pipeline Company v. Ideal Cement Company**, 369 U.S. 134, 82 S.Ct. 676, 7 L.Ed.2d 623. In the **United Gas Pipeline** case, the Supreme Court held that the federal courts are bound by the decisions of the state courts as to the interpretations of state-taxing statutes, insofar as how the tax is levied and at what the state tax is directed. The Supreme Court in the **United Gas Pipeline** case stated:

> 'The interpretation of state law by the Court of Appeals, in an opinion by its Alabama member, was rendered in advance of construction of the License Code by the courts of the State, which alone, of course, can define its authoritative meaning. * * * Accordingly, the judgment of the Court of Appeals is vacated to permit a construction of the License Code of the City of Mobile, so far as relevant to this litigation to be sought with every expedition in the state courts. It is so ordered. (Emphasis supplied.)'

"It is clear, therefore, that the Supreme Court of the United States says to federal district courts, in instances such as this Court now has before it, that the duty of determining the authoritative meaning of a state-taxing statute is imposed upon the state courts and not upon the federal courts. Such a proposition is particularly applicable here where the Alabama State court has already interpreted the meaning of the Alabama State law * * *"

See also **Alabama v. King & Boozer**, 314 U.S. 1, at pages 9 and 10, 62 S.Ct. 43, at page 46.

In construing the statute the District Court in **Olan Mills, Inc., of Tennessee** (207 F.Supp. at page 335) also pointed out that:

"In each instance, the Alabama Supreme Court construed Section 569 of the state statute to be a tax levied upon and directed at the purely local activities of the photog-

raphers or other representatives of the company taking and processing the pictures in Alabama."

To follow the Appellant's "fractionalizing" theory, the states would be precluded under the commerce clause from levying any kind of license tax on persons who come from without the state and do local business within the state, as each such case might be said to have an element (even though remote) of interstate commerce involved. And certainly it appears that such persons should bear their fair share of state taxation, in enjoying the local markets in competition with local businesses, who are required to pay such taxes. Under the evidence in this case the tax on "transient and traveling" photographers does not discriminate between interstate and intrastate commerce in that it is laid on all transient photographers alike, whether they come from within or without the state. And such activities of the transient or traveling photographers taking place in Alabama could not be subject to multiple taxation, nor could the same activities be subject to taxation in another state. The statute as applied in this case clearly does not burden interstate commerce.

As we, however, read the decisions of this court concerning the subject matter it appears that the "incidence" of the tax, or the thing at which the tax is directed has a great deal to do with whether or not a tax (including a license tax) can be validly levied where allegedly there is a question under the commerce clause.

In **Spector Motor Service v. O'Connor**, 340 U.S. 602 (1951), supra, it was pointed out by this court that it was stipulated by the parties that Spector's transportation business was conducted exclusively in interstate commerce. Thus, this court held that Connecticut's Franchise Tax (a license tax) could not be validly levied on such business as it was exclusively interstate, and as the tax under the circumstances was laid directly on interstate commerce, which is forbidden under the commerce clause.

"The objection to its validity does not rest on a claim that it places an undue burden on interstate commerce in return for protection given by the state. * * *

"The answer in the instant case has been made clear by the courts of Connecticut. The incidence of the tax provides the answer. The courts of Connecticut have held that the tax before us attaches solely to the franchise of the petitioner to do interstate business."

(Emphasis Supplied)

340 U.S. 602, at pages 607 and 608, 71 S.Ct. 508, at pages 511 and 512.

Thus, the decision in **Spector** was based on the premises that Spector was engaged exclusively in the state in interstate commerce, and that the tax attempted to be extracted by Connecticut was laid solely on said commerce. This court, however, in that case stated in effect that had the circumstance been different, the tax might have been sustained.

"Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. **Interstate Oil Pipe Line Co. v. Stone**, supra; **International Harvester Co. v. Evatt**, 329 U.S. 416, 67 S.Ct. 444, 91 L.Ed. 390; **Atlantic Lumber Co. v. Com'r of Corporations and Taxation**, 298 U.S. 553, 56 S.Ct. 887, 80 L.Ed. 1328. The same is true where taxpayer's business activity is local in nature, such as the transportation of passengers between points within the same state, although including interstate travel. **Central Greyhound Lines v. Mealey**, 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633, or the publication of a newspaper, **Western Livestock v. Bureau of Revenue**, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823. See also, **Memphis Natural Gas Co. v. Stone**, 335 U.S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832."

(Emphasis Supplied)

Spector Motor Service v. O'Connor, supra, 304 U.S. at pages 609 and 610, 71 S.Ct. at pages 512 and 513.

Another feature of the Spector decision was that this court recognized therein, like in King and Boozer and in United Gas Pipe Line Company that it is the duty and right of state courts to determine the characteristics of a state tax and to define its authoritative meaning.

> "The answer in the instant case has been made clear by the courts of Connecticut. It is not a matter of labels. The incidence of the tax provides the answer."
> (Emphasis Supplied)

Spector, supra, 304 U.S. at page 608, 71 S.Ct. at page 512.

The Alabama court has repeatedly in Graves, Olan Mills, Inc., and this case construed the license tax statutes involved, insofar as it relates to "transient or traveling" photographers, as follows:

> "The license in both respects is directed against one who pursues the art of photography in Alabama. When a photographer comes into the state, or resides in the state, and moves about in it from place to place, pursuing his profession, he is an itinerant. Shiff v. State, 84 Ala. 454, 4 So. 419, supra. He is then in Alabama rendering some of the essentials of the art of photography as a business, the same as if he had a fixed location here. It is not necessary to perform all the essentials of the art in Alabama to constitute one a photographer subject to license as such in Alabama. The performance of an important feature of it in Alabama is justification for exercising the licensing power. Standard Oil Co. v. City of Selma, 216 Ala. 108, 112 So. 532; Sanford Service Co. v. City of Andalusia, supra. The distinction between such a situation and that of drummers soliciting and procuring sales to be consummated by interstate shipments has been narrowly drawn in express terms, as we have shown. The principle of the drummers' license cases has not been extended by the United States Supreme Court to a situation where there was locally performed an essential physical act in the

performance of a transaction and where the license was directed solely at that local activity, and where it is not laid on interstate transportation nor is an undue burden upon it."

(Emphasis Supplied)

State v. Graves, 258 Ala. 539, 62 So.(2d) 446, at 448 and 449 (1953).

This conclusion reached by the Alabama court in Graves, and also in effect in Olan Mills, Inc. and in this case appears to be supported by the following cases:

Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388 (1961); Olan Mills, Inc. of Tennessee v. City of Opelika, et al, 207 F.Supp. 332 (1962).

Standard Dredging Corp. v. State of Alabama, 271 Ala. 22, 122 So.(2d) 280, appeal dismissed, 364 U.S. 300, 81 S.Ct. 268.

Dorskey v. Brown, 255 Ala. 238, 51 So.(2d) 360, cert. den., 342 U.S. 818, 72 S.Ct. 34.

Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546.

Caskey Baking Co. v. Commonwealth of Virginia, 313 U.S. 117, 61 S.Ct. 881 (1941), and cases cited in Footnote 3 as this case appears in 313 U.S. at page 119, and in 61 S.Ct. at page 883.

Armour & Company v. Commonwealth of Virginia (1918), 246 U.S. 1, 38 S.Ct. 267.

General Motors Corp. v. Washington, 377 U.S. 436, 84 S.Ct. 1546, 1571 (1964).

State of Alaska v. Artic Maid, 366 U.S. 199, 81 St.Ct. 928 (1961).

Memphis Natural Gas v. Stone, 335 U.S. 80, 86, 87; 68 S.Ct. 1475, 1477, 1478 and cases cited (1948).

General Trading Company v. State Tax Commission, 322 U.S. 335, 64 S.Ct. 1028 (1944).

15 C.J.S. 785, Commerce, Section 111(2), and cases cited in footnotes thereunder.

"The incidence of the tax provides the answer * * *"

Spector Motor Service v. O'Connor, 340 U.S. 602, at 608, 71 S.Ct. 508, at 512 (1951).

Alabama v. King & Boozer, 314 U.S. 1, at 9, 62 S.Ct. 43, at 45 (1941).

United States v. Boyd, 378 U.S. 39, 84 S.Ct. 1518 (1964).

2.

THE EXTRACTION INVOLVED IS NOT A PERMIT OR ENTRANCE FEE, IT IS MERELY A TAX.

The licenses levied under Article 1, Chapter 20, Title 51, Code of Alabama 1940, Recompiled 1958, of which Section 569 is a part, show on their face that they are merely business and professional license taxes, which are levied on the privilege of one engaging in one or more of such businesses in this state, and that they are applied only to those doing business in this state. They are in no respect police or regulatory laws. They are merely privilege taxes for the doing of business in this state, and do not give anyone a license to commit a specific act. Cosmus v. Lee, 236 Ala. 396, 183 So. 185, 118 A.L.R. 822. See also United Gas Pipeline Company v. Ideal Cement Company, et al, 277 Ala. 612, 173 So.(2d) 777, 778, and Sun Flower Lumber Company v. Turner Supply Company, 158 Ala. 191, 48 So. 510, 511.

In construing the City of Mobile's License Tax Code applying to businesses, etc., engaged in in that city, which Code had similar provisions to those contained in Article 1, Chapter 20, Title 51, Code of Alabama 1940, Recompiled 1958, and particularly those contained in Sections 450 and 831, as amended, Title 51, supra, the Supreme Court of Alabama in the case of United Gas Pipeline Company v. Ideal Cement

Company, et al, supra, 173 So.(2d) at page 779, characterized such taxes, as follows:

> "The Circuit Court decreed, and this court agrees, that the license fee or tax imposed by said ordinance is for engaging in the business of selling and distributing natural gas in the City of Mobile and its police jurisdiction and does not impose a license tax for entering Mobile to engage in business."
>
> (Emphasis Supplied)

Although included in the same Code section, namely, Section 569 of Title 51, supra, the license tax on photographers and photography gallaries operating from fixed locations in this state and the license tax on "transient and traveling" photographers, are entirely separate and distinct levies.

Despite what the Appellant would have the court believe, the license tax on transient or traveling photographers is levied upon and applied to all transient photographers who travel from county to county in this state and practice their profession, whether such photographers are Alabama residents, who originate their activities in Alabama, or whether they come from without the state. All transient or traveling photographers for the purpose of the levy of the tax or its application are treated alike. Moreover, there is no evidence in this case whatsoever that any transient photographer who comes from without the state and goes from county to county in this state conducting sittings and taking pictures with his camera has ever been discriminated against, or that there has ever been any preferential treatment in the case of the transient photographers who come from within this state.

The Supreme Court of Alabama has in this case and also in the Graves and Olan Mills, Inc., cases repeatedly pointed this fact out.

> "The license in both respects is directed against one who pursues the art of photography in Alabama. When a photographer comes into the state, or resides in the state, and

moves about from place to place, pursuing his profession, he is an itinerant."

(Emphasis Supplied)

Citing Shiff v. State, 84 Ala. 454, 4 So. 419.

State v. Graves, 258 Ala. 539, 62 So.(2d) 446, at pages 448 and 449 (1953).

See also Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388 (1961).

The Supreme Court of Alabama in this case and in the Graves and the Haden cases, supra, has characterized this tax and defined the authoritative meaning of the taxing statute as being a tax directed against "each" photographer, and a transient or traveling photographer and such photographer's activities taking place exclusively in this state.

The Appellant repeatedly urges that actually the license tax here involved, although expressly said by the terms of the taxing statute itself to be a license tax on "each transient or traveling photographer," is directed at "solicitations" and sales taking place in interstate commerce.

The Supreme Court of Alabama not only in this case, but also in the Graves and Haden cases has clearly and unmistakably construed this taxing statute as being directed at the transient photographer and his activities taking place solely in this state, in conducting the sittings and taking the pictures.

"The license tax here imposed is not laid on the solicitation of orders."

(Emphasis Supplied)

Graves v. State, 258 Ala. 359, 62 So.(2d) 446, at 449.

See also Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388, at page 389.

The Alabama Court has said in effect that the transient photographer license tax itself is not laid on sales or selling.

In the Graves opinion (62 So.(2d) at page 449) it is pointed out that Graves, the transient photographer was an employee of Olan Mills, Inc., of Tennessee. That prior to Graves conducting the sittings and taking the pictures, an advanced unit of salesmen (also employees of Olan Mills, Inc.) had solicited and secured contracts for photographs to be made, and that sometime later, and at the appointed time the traveling photographers (a separate and distinct group) would appear and conduct the sittings and take the pictures or exposures. 62 So.(2d) at page 449.

The reference to the "solicitations" in this case having been made by the Appellant is equally as erroneous. The record shows that the solicitations in this case were actually made by the employees of J. C. Penney, who were employed at the local Penney stores in this state, where the traveling photographer sent out by the Appellant later appeared and conducted the sittings and took the pictures or exposures. The appointments therefore were made in advance by the local Penney employees.

The record will also show that the President of the Appellant Corporation testified at the trial in the Circuit Court that the J. C. Penney Company was not considered to be in any respect the agent of the Appellant. That both corporations acted independently in regard to the activities carried on by each. Of course, we realize that whether J. C. Penney Company was the agent of the Appellant in carrying on certain of the activities involved under the facts, would actually constitute a question of law.

The Alabama Supreme Court found (Appendix, page 39) that there were no solicitations in Alabama made by the Appellant's employees, but that the orders for the pictures were actually taken by the local Penney employees.

> "We do not find anywhere in the record that the photographer took orders for the pictures. This was done, as

we have stated, by Penney employees and mailed to Appellant for acceptance."

(Emphasis Supplied)

The foregoing being considered and for purposes material and relevant to the alleged questions in this case, the facts in Graves and Haden appear to be very similar, if not almost identical.

3.

WE AGREE WITH THE APPELLANT THAT ALL CASES INVOLVING ALLEGED VIOLATIONS OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, SHOULD BE DECIDED ON THEIR OWN SPECIFIC FACTS. MOREOVER, THIS APPEARS TO HAVE BEEN THE POLICY OF THIS COURT, JUDGING BY THE DECISIONS OF THE PAST AS WELL AS THE PRESENT.

Our agreement, however, ends in this respect, when the Appellant attempts to draw an analogy between the facts of this case and those involved in **Nippert v. Richmond**, 327 U.S. 416 (1946), **Freeman v. Hewit**, 329 U.S. 249 (1947), **Memphis Steam Laundry v. Stone**, 342 U.S. 389 (1954), and **West Point Grocery Company v. Opelika** (1957), 354 U.S. 390, 71 S.Ct. 1096. The breach even becomes wider when the Appellant attempts to apply the doctrines of those cases to the facts in this case.

The City Ordinance involved in **Nippert** levied a license tax on "Agents - Solicitors - Persons, Firms or Corporations engaged in business as solicitors." 327 U.S. at page 587. In addition it had this very significant provision: "Permit of Director of Public Safety required before license will be issued * * *" This last provision did give the specific license ordinance involved in **Nippert** the earmarks of an entrance fee and regulatory license.

There is a very material difference in the levy of the license in **Nippert** (expressly on "solicitors" and solicitations) and

the state license tax statute involved in **Graves, Haden**, and in this case, the characteristics of which we have already pointed out in some detail. Also, in this respect it is very important to note that neither the State License Tax Statute involved Title 51, Section 569, Code of Alabama 1940, Recompiled 1958, nor the general provisions relating to the Business and Occupational License Taxes on the state and county level, namely, Section 450 and Section 831, as amended, et seq., Code of Alabama 1940, Recompiled 1958, require in any place or respect that a permit be procured before any of said business and professional licenses can be paid, or before any of the businesses taxed can be engaged in in this state. As stated before, they have been very clearly held to be license taxes levied on the doing of business, and become due after the business has been engaged in in this state. They are not entrance fees or licenses giving the licensee permission to do a certain thing or perform a certain act.

The Appellant could go into quite an amount of detail in distinguishing the facts, as well as the taxing statutes involved in **Nippert, Freeman v. Hewit, Memphis Steam Laundry v. Stone, Railway Express Agency v. Virginia, West Point Grocery Company v. Opelika**, and other like cases, from the particular facts and the specific statute involved in the case at bar. However, space and the rules will not permit, nor do we deem this necessary as this court is very familiar and conversant with all of these cases.

We will point out that the tax in **Freeman v. Hewitt** was a gross receipts tax on sales. (329 U.S. at 250 and 251). The sales in that case were held to be exclusively in interstate commerce, thus the tax to be so directed.

The tax in **Memphis Steam Laundry Cleaners v. Stone** (342 U.S. at 425), was a license tax on "each person soliciting business for a laundry not licensed in this state (Mississippi) * * *" The tax in **Railway Express Agency v. Commonwealth**

of Virginia, was also held under the particular facts of that case (347 U.S. at pages 359 and 360) to be a tax laid directly on interstate commerce and invalid as such. Virginia was said to have a constitutional provision forbidding a foreign corporation from exercising any public service powers or functions in that state. The tax involved was said to be a license tax on the gross receipts earned in the state "on business passing through, into or out of this state (Virginia)." Because of such constitutional prohibition, all purely local or interstate business was done by a separate corporation (a domestic corporation and local subsidiary). Thus, it was said that Railway Express was engaged (like Spector Motor Service, 340 U.S. 602), insofar as Virginia was concerned, strictly in interstate commerce, and the license tax involved as so directed to be in conflict with the Commerce Clause. In West Point Grocery Company v. Opelika, 340 U.S. 390, the grocery company's agents solicited orders for groceries in Opelika, Alabama, and took the orders back to be accepted and filled in West Point, Georgia, and delivered the groceries so ordered upon their subsequent return. Thus the case was said to involve the solicitation of orders for sales made solely in interstate commerce.

The crux of the decisions in Nippert, Hewit and Memphis Steam Cleaners, and West Point Grocery Company was that the taxing statutes involved imposed taxes whose incidences were laid directly on "solicitations" or sales in interstate commerce, and thus were laid directly on interstate commerce. The license tax involved in Railway Express Agency was held to be invalid as being laid directly on the gross receipts which Railway Express derived from its purely interstate business.

Said cases then are all said to involve taxes levied directly on interstate commerce. They differ materially from the cases where taxes have been upheld by this court as having been levied or laid on events taking place within the taxing state or local activities, which can be reasonably separated from the interstate activities.

Caskey Baking Company v. Commonwealth of Virginia, 313 U.S. 117, 119, 61 S.Ct. 881, 882, and cases cited under Footnote No. 3.

Memphis Natural Gas v. Stone, 335 U.S. 80, 68 S.Ct. 1475, 1477, 1478 and cases cited.

Spector Motor Services v. O'Connor, 340 U.S. 602, at page 608, 71 S.Ct. 508, at page 512.

Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546.

General Trading Company v. State Tax Commission, 322 U.S. 335, 64 S.Ct. 1028.

State of Alaska v. Artic Maid, 366 U.S. 199, 81 S.Ct. 928.

General Motors Corporation v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 1571; among a number of other cases to the same effect.

The fact that Section 569 of Title 51 of the Alabama Code of 1940, Recompiled 1958, levies only a license tax on the doing of business in this state, or that the License Tax Code of the State of Alabama, of which Section 569 is a part, applies only to such taxes, and in no respect requires fees for the entry of licensees into this state, or a permit before engaging in such businesses, is so apparent from the statutes themselves that we do not believe that any further comment is necessary. We have, however, discussed this particular point in detail already in this brief, as well as having already cited authorities holding that these license taxes are not entrance fees or permits, but are merely taxes on the doing of business in this state, so we will not repeat them here. See Sun Flower Lumber Company v. Turner Supply Company, 158 Ala. 191, 48 So. 510, at page 511, etc.

4.

THE QUESTION POSED BY THE APPELLANT HAS ALREADY BEEN DETERMINED BY THIS COURT.

Caskey Baking Compahy v. Commonwealth of Virginia, 313 U.S. 117, 119, 61 S.Ct. 881, 882, under Footnote No. 3.

Memphis Natural Gas v. Stone, 335 U.S. 80, 68 S.Ct. 1475, 1477, 1478 and cases cited.

Spector Motor Services v. O'Connor, 340 U.S. 602, at page 608, 71 S.Ct. 508, at page 512.

Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546.

General Trading Company v. State Tax Commission, 322 U.S. 335, 64 S.Ct. 1028.

State of Alaska v. Artic Maid, 366 U.S. 199, 81 S.Ct. 928.

General Motors Corporation v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 1571; among a number of other cases to the same effect.

5.

THE LICENSE TAX ON TRANSIENT PHOTOGRAPHERS APPLIES TO ALL SUCH PHOTOGRAPHERS, WHETHER THEY COME FROM WITHIN OR WITHOUT THE STATE OF ALABAMA, AND NO PREFERENTIAL TREATMENT IS SHOWN UNDER THIS LICENSE TAX STATUTE TO THOSE WHO COME FROM WITHIN THE STATE. IT IS APPLIED EQUALLY TO ALL TRANSIENT PHOTOGRAPHERS.

The annual state license tax on photographers following their profession at a fixed location or place of business in this state has nothing whatsoever to do with the license levied by the Legislature on transient or traveling photographers.

The levy on transient or traveling photographers is complete within itself.

"For each transient or traveling photographer, five dollars per week."

The above quoted levy and license tax is entirely separate and distinct from the levy on photographers doing business at a fixed location in this state, as a reading of Title 51, Section 569, Code of Alabama 1940, Recompiled 1958, will clearly show.

The license taxes imposed by Section 569 of one amount on photographers who have a fixed location in this state and a different amount on transient or traveling photographers have been held by the Supreme Court of Alabama to be two separate and distinct levies and the difference in the amount of the two levies not to constitute an inherent discrimination, but to the contrary to be based upon a reasonable classification of photographers. **Graves v. State**, 258 Ala. 359, 62 So.(2d) 446, at page 448. See also **Finley v. State**, 37 Ala. App. 555, 72 So.(2d) 135.

"No 'iron rule of equality' between taxes laid by a State on different types of business is necessary. **Caskey Baking Co. v. Commonwealth of Virginia**, 313 U.S. 117, 119-121, 61 S.Ct. 881, 882-883, 85 L.Ed. 1223; **Morf v. Bingaman**, 298 U.S. 407, 414, 56 S.Ct. 756, 80 L.Ed. 1245; **Capitol Greyhound Lines v. Brice**, 339 U.S. 542, 546-547, 70 S.Ct. 806, 808-809, 94 L.Ed. 1053."

State of Alaska v. Artic Maid, 366 U.S. 199, at page 205, 81 S.Ct. 933, at page 932.

This court on numerous occasions has also recognized the rights of the states to set up proper classifications, and even sub-classifications, for the purpose of levying state taxes, and for the purpose of fixing different amounts for such purpose. This court has also upheld such classifications or sub-classifications wherein there is any reasonable grounds or basis to make such differences or separate classifications. See **Carmichael v. Southern Coke and Coal Company**, 301 U.S. 495, 57 S.Ct. 868, **Clark v. Paul E. Gray, Inc.**, 306 U.S. 583, 594, 59

S.Ct. 744, 750, 751, Caskey Baking Company v. Commonwealth of Virginia, 313 U.S. 117, pages 120 and 121, 61 S.Ct. 881, at page 883.

The Alabama Supreme Court also in the Graves case (62 So.(2d) at pages 448 and 449), and in the Haden case, and in this case, has recognized, and in effect has held, that the license tax on transient or traveling photographers is levied on transient photographers, whether they come from within or without the state, and that "transient or traveling" photographers can be properly classified for the purpose of the tax, separate and distinct from photographers having a photograph gallery or fixed location.

And as we understand it, the taxing power of a state is not to be regarded as having been exercised in an unconstitutional manner where the levy is non-discriminatory in character, does not materially impede the commerce, and is not subject to local levy in some other sovereignty. State of Alaska v. Artic Maid, 366 U.S. 199, 81 S.Ct. 929, Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546, Cloverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604, 58 S.Ct. 736, among others.

The state has also always applied this license tax to all photographers who travel from county to county in this state taking pictures, regardless of whether they are Alabama residents, and their activities originate in this state, or whether they come from without the state. There is absolutely no evidence in this case that there has been any discrimination.

6.

WE ARE THE FIRST TO AGREE THAT INTERSTATE COMMERCE CANNOT BE LICENSED BY THE STATES. HOWEVER, THE TAX IN THIS CASE IS NOT DIRECTED AT INTERSTATE COMMERCE, BUT HAS BEEN CLEARLY HELD TO BE DIRECTED AT LOCAL ACTIVITIES TAKING PLACE WITHIN THIS STATE.

The license tax here under facts very similar to the facts involved in this case has been repeatedly held not to be directed at solicitors or sales in interstate commerce, or on interstate commerce itself. To the contrary it has continuously been held to be directed only at local activities taking place within the boundries of this state. **Graves v. State**, 258 Ala. 359, 62 So.(2d) 446; **Haden v. Olan Mills**, 273 Ala. 129, 135 So.(2d) 338; **Olan Mills, Inc. of Tennessee v. City of Opelika, Alabama, et al**, 207 F. Supp. 332 (1962).

7.

THE GREAT MAJORITY OF CASES OF THIS COURT RELEVANT TO THE SUBJECT MATTER WOULD SUSTAIN THIS LICENSE TAX AS HELD TO BE DIRECTED AT LOCAL ACTIVITIES TAKING PLACE WITHIN THE TAXING STATE.

The federal cases most cited and insisted upon by the Appellant, namely, the **Nippert** case, 327 U.S. 416, **Spector Motor Service, Inc. v. O'Connor**, 304 U.S. 602, **Railway Express Agency, Inc. v. Commonwealth of Virginia**, 347 U.S. 359, and **West Point Grocery Company v. Opelika**, 354 U.S. 390, have all been discussed in detail and clearly distinguished from the case at bar from the standpoint of the law and the facts in at least two instances in this brief, so we believe that that will suffice to show the facts of those cases to be entirely different from the facts of this case, and that the doctrines of those cases not to be applicable or relevant to the situation here.

The above is also true as to the state court cases which the Appellant has also cited and discussed. Those cases also all involve different facts or different statutes and taxes which were held to be levied on or directed at solicitations or selling. In fact the Supreme Court of Alabama has in both the Graves case (62 So.(2d), at pages 449 and 450) and in the **Haden** case (135 So.(2d), at pages 389 and 390), very clearly distinguished those cases from the facts and circumstances here involved.

Actually the case of **Commonwealth v. Olan Mills, Inc.**, 196 Va. 898, 86 S.E.(2d) 27, is the only case cited by the Appellant in this respect which might be said to have any material identity in fact or similarity in statute.

However, in said **Olan Mills, Inc.** case there is a very serious difference:

> "McCarter, the individual here charged, was not even a cameraman; he was a solicitor."
> (Emphasis Supplied)

86 S.E. at page 29.

This alone seems to make said **Olan Mills, Inc.** case (86 S.E.(2d) 27), fall within the scope of the other cases cited by the Appellant, which turn on the fact that the taxing statutes involved therein were either held to be directed at "solicitations" or at sales made in interstate commerce.

In said Virginia case the Virginia Court construed the Virginia statute ("as it had a right to do") entirely differently from the way that the Alabama court has repeatedly construed the Alabama statute involved (Title 51, Section 569, supra). That is, the Alabama court has repeatedly held the Alabama License Tax on "traveling and transient photographers" to be directed at the conduct of such photographers in this state in conducting the sittings and taking the pictures, regardless of whether the photographer comes from within the state or from without the state. Cases upholding the license tax as so directed, and considering it to be a tax on local activities, which can be reasonably separated from the interstate activities, in addition to the holding of the Alabama court in this case are:

Graves v. State, 258 Ala. 539, 62 So.(2d) 446 (1953).

Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388 (1961).

Olan Mills, Inc. of Tennessee v. City of Opelika, Alabama, et al., 207 F. Supp. 332 (1962).

Lucas v. City of Charlotte (4th Cir.) 86 F.(2d) 394, 109 A.L.R. 297.

Craig v. Mills, 203 Miss. 692, 33 So.(2d) 801.

The cases cited by the Virginia court in its decision in Commonwealth v. Olan Mills, Inc. (86 S.E. 27) were the Nippert case (327 U.S. 416), Memphis Steam Laundry Cleaners (342 U.S. 389), and other cases where the taxes involved were said to be laid mainly on "solicitations" or interstate sales.

The record in this case shows that the orders were procured and solicitations made, not by the employees of the Appellant, Dunbar-Stanley, Inc., but by the local employees of the J. C. Penney Stores located in Alabama. Moreover, the Alabama court in its opinion in this case (Appendix, page 39, et seq.), so found:

> "We do not find anywhere in the record that the photographer took orders for the pictures. This was done, as we have stated, by Penney employees and mailed to Appellant for acceptance."
>
> (Emphasis Supplied)

As indicated by the record in this case, Appellant prices its photographs at fifty-nine cents apiece. It is small wonder that Appellant operates in some 47 or 48 states, etc. Appellant does not pay its way. Other transient photographers cannot compete.

The facts of this case do not conform with the holding of the United District Court for New Mexico in the Dunbar-Stanley case there involved. The statute there involved was said to be directed at sales consummated in interstate commerce. The same is also true in regard to the opinion in Commonwealth of Virginia v. Olan Mills, Inc., 196 Va. 898, 86 S.E.(2d) 27. Those cases do not even consider, and entirely ignore, the decisions of this court in Caskey Baking Company v. Commonwealth of Virginia, 313 U.S. 117, 119, 120, 61 S.Ct. 881, 882, 883, and the other cases cited and referred to by us upholding taxes under the Commerce Clause, where directed at local activities.

This would also include the pronouncements of this court even in Spector Motor Service v. O'Connor, 340 U.S. 602, at 608, which expressly exclude from the doctrine of that case taxes directed at local activities, or where both intrastate and interstate commerce is involved.

The facts of this case undisputedly show that local employees of the J. C. Penney stores in this state, handled the advertising, solicited the orders for the photograph, and arranged the sittings, and also collected the money from the customers. Penney deducted fifteen percent in each case for its fee, and sent the rest to the Appellant. Penney also delivered the photographs when finished to the customers. All of these activities also took place solely within this state. No solicitations were made in this state by employees of the Appellant.

At the appointed time, and in the several Penney stores involved, the Appellant's traveling or transient photographers appeared and conducted the sittings and took the pictures or exposures. Such local activities on the part of the Appellant's photographers is the local event at which the Alabama Court has repeatedly held that the license tax involved is directed, and the thing which it hits.

> "While the transportation of the bread over the State line is interstate commerce, that is not the activity which is licensed or taxed. The purely local business of peddling is what the tax hits, and this irrespective of the source of the goods sold. It is settled that such a statute imposes no burden upon interstate commerce which the Constitution interdicts. (citing cases in support thereof under footnote "3")."
>
> (Emphasis Supplied)

Caskey Baking Company v. Commonwealth of Virginia, supra, 313 U.S. at 119, 61 S.Ct. at pages 882 and 883.

See also State of Alaska v. Artic Maid, 366 U.S. 199, 81 S.Ct. 929.

Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546.

Not all state taxation is to be condemned simply because in some manner it affects interstate commerce.

McGoldrick v. Berwind-White Coal Company, 309 U.S. 33, 60 S.Ct. 388.

Postal Telegraph and Cable Co. v. Richmond, 249 U.S. 252, 39 S.Ct. 265.

CONCLUSION

The Appellant's use of the term "fractionalized" in this case is pure nomenclature and is actually nothing more than a high sounding label. In the light of the facts (which are said to be of utmost importance in this type of case) the term is without substance.

The Legislature has only sought in enacting the taxing statute to tax all "transient or traveling" photographers, who go from county to county, wherein they have no fixed place of business, and wherein they follow their profession. It matters not whether they come from within or without the state, under such circumstances the tax is applied equally to all transient or traveling photographers. The tax has been repeatedly so characterized by the Alabama court, and said to be directed at local activities taking place in this state. Moreover, there is no evidence in this case that the tax as so levied discriminates against interstate commerce, or that it places an undue burden on such commerce, or that the tax as so directed could be lawfully duplicated by any other state.

The foregoing being considered, it clearly appears that the decisions of the courts below in upholding the validity of the tax and the assessment should be affirmed by this Honorable Court.

Respectfully submitted.

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PROOF OF SERVICE

I, William H. Burton, of Counsel for the Appellee, hereby certify that I have served a copy of the foregoing brief in behalf of the Appellee on Honorable J. Edgar Thornton, P. O. Box 23, Mobile, Alabama, 36601, and Honorable Glen B. Hardman, 1210 North Carolina National Bank Building, Charlotte, North Carolina, 28202, as Attorneys for the Appellant, by mailing copies thereof to them by first class United States mail, postage prepaid, and to their respective addresses, on this the 19th day of December, 1968.

Wm. H. Burton

WILLIAM H. BURTON,
Of Counsel for the Appellee